

**U.S. DEPARTMENT OF LABOR**

SECRETARY OF LABOR  
WASHINGTON, D.C.

**DATE:** June 30, 1992  
**CASE NO. 91-JTP-5**

IN THE MATTER OF  
JOB SERVICE NORTH DAKOTA,

**v.**

**u. s. DEPARTMENT OF LABOR.**

**BEFORE: THE SECRETARY OF LABOR**

**FINAL DECISION AND ORDER**

This case arises under the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1781 (1988), and the implementing regulations at 29 C.F.R. Part 629 (1991) and 20 C.F.R. Part 18 (1991).

**BACKGROUND**

The Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) in this case on November 22, 1991, affirming the Grant Officer's determination denying Job Service North Dakota's (JSND) request for a waiver of liability with respect to \$877.71 in disallowed costs claimed by JSND under its JTPA grants. The ALJ reversed the Grant Officer's determination that repayment be made from non-federal funds. Instead he found repayment inappropriate and ordered, pursuant to Section 164(d), 29 U.S.C. § 1574(d), that the debt be offset against other

federal funds to which JSND may be entitled under the Act.

D. and O. at 5-6.

The Grant Officer excepted to the **ALJ's** decision solely on his interpretation of section 164(d). JSND did not except to the **ALJ's** decision, therefore all other issues in the case are waived. 29 U.S.C. § 1576(b).

#### DISCUSSION

JTPA addresses repayment of misexpended funds as follows:

(d) Recipient's liability for noncomplying expenditures

Every recipient shall repay to the United States amounts found not to have been expended in accordance with this chapter. The Secretary may offset such amounts against any other amount to which the recipient is or may be entitled under this chapter unless he determines that such recipient should be held liable pursuant to subsection (e) of this section. No such action shall be taken except after notice and opportunity for a hearing have been given to the recipient.

(e) Conditions for recipient's liability;  
conditions for recipient's liability for  
subgrantee noncompliance: Secretary's  
discretion

(1) Each recipient shall be liable to repay such amounts, from funds other than funds received under this chapter, upon a determination that the misexpenditure of funds was due to willful disregard of the requirements of this chapter, gross negligence, or failure to observe accepted standards of administration. No such finding shall be made except after notice and opportunity for a fair hearing.

29 U.S.C. § 1574(d) and (e)(1) (emphasis added).

There is no indication in the record that this is a case of willful disregard or the other proscribed misconduct under

subsection (e)(1). Subsection (e)(1) specifies that repayment shall be from non-federal funds and subsection (d) does not specify the source of repayment. The ALJ, however has merged the specification in (e)(1) and the absence of fund specification in (d) by holding that repayment from non-federal funds will apply **"only"** upon determining that one of the (e)(1) conditions existed. D. and O. at 5. The Grant Officer is correct that such reading is error because it would negate the discretion the statute directs be exercised by the language in (d) that the "Secretary may **offset**" disallowed amounts.

Subsection (d) provides that the Secretary may offset the amount of misexpended grant funds from such funds under the Act to which the recipient is or may be entitled, unless the Secretary determines that the recipient is liable pursuant to subsection (e). If Congress intended to require the Secretary to offset unless the conditions of subsection (e)(1) are met, it would have used the word **"shall"** rather than **"may"** in subsection (d). The statutory use of **"may,"** particularly in close conjunction with **"shall,"** indicates discretionary authority, whereas **"shall"** usually indicates a mandatory obligation. Farmer & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 662-63 (1923). See also Fernandez v. Brock, 840 F.2d 622, 632 (9th Cir. 1988) (**"May"** is a permissive word and will be construed to vest discretionary power absent a clear congressional indication that is was used in a mandatory sense). Accordingly, I read Section 164(d) as permitting the Secretary (and her delegates, the ALJ

and/or the Grant Officer, as applicable) to exercise discretion in determining whether to permit offset when none of the conditions indicated in Section 164(e)(1) are present.

The Grant Officer contends in his initial brief before me that **JSND's** request **for** Offset was not timely. But the Grant Officer did not raise this issue in his exceptions and the Act provides that "[a]ny exception not specifically urged shall be deemed to have been waived." 29 U.S.C. § 1576(b). In the alternative, the Grant Officer requests that the case be remanded to him for consideration of the appropriateness of offset.

Neither the Act, its legislative history, the pertinent regulations nor the parties' submissions before me provide any specific guidance for exercising discretionary authority in permitting recipient offsets. Section 164(e)(2) of the Act sets out a series of standards for situations where a recipient seeks waiver of recoupment where funds were misspent by a subgrantee. 29 U.S.C. § 1574(e)(2). Although such waiver is not at issue here, the standards offer a useful guide in formulating appropriate sanctions for recovering misexpended JTPA funds. The standards include, inter alia: diligent monitoring activities and prompt and appropriate corrective action upon becoming aware of any violation of the Act or the regulations.

The Grant Officer has not contested the **ALJ's** characterization of **JSND's** erroneous eligibility determinations as "good faith errors," nor the fact that it was the **JSND's** internal monitoring procedures that uncovered the errors. Further, JSND took

immediate steps to rectify the mistakes and modified its program procedures to ensure that such errors would not recur. In this situation, I find that the record supports offset as an appropriate method to recoup **JSND's** disallowed costs. In view of the small amount at issue (\$877.71) and the specific facts of this case, I do not find that a remand is an efficient use of the Department's resources.

Accordingly, pursuant to 29 U.S.C. § 1574(d), I AFFIRM the **ALJ's** order that \$877.71 be offset against other federal funds to which JSND may be entitled under the Act.

SO ORDERED.

  
Secretary of Labor

Washington, D. C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Job Service North Dakota v.  
United States Department of Labor

Case No. : **91-JTP-5**

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following  
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